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NORTH AMERICAN REVIEW.

No. DXXXVII.

AUGUST, 1901.

THE INSULAR CASES.

BY GEORGE F. EDMUNDS, FORMERLY UNITED STATES SENATOR FROM
VERMONT.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." (Constitution of the United States, Article VI.)

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Amendment X., Constitution of the United States.)

Two recent decisions of the Supreme Court of the United States have compelled renewed and solicitous attention to the fundamental and constitutional relations, for all time to come, of Congress and the President to the inhabitants of New Mexico, Arizona, Alaska, Oklahoma, the Philippine Islands, Porto Rico and the Hawaiian Islands, as well as to all other citizens, subjects and aliens (and slaves in the Philippines) who may happen not to be within the geographical boundaries of any *State* of the United States, but still within the political dominion of our country in some of its Territories. Happily for the inhabitants of Ohio, and of the great and prospering States of the Northwest living under the sway and protection of both National and State

constitutions, their fair lands have ceased to be Territories, and they are delivered from the despotism, however benevolent and wise, of a Congress in which they could have no vote, and whose power over their lives, liberties, fortunes and happiness was restrained by no constitutional barrier. Probably, an absolute despotism is the best imaginable government, provided the ruler is the complete embodiment of all wisdom and virtue. But in all the history and experience of the world, no such ruler, or body of rulers, or any resembling him or them, have ever appeared. A conclave of despots has almost always been found to be worse than a single despot. The French Directory was worse than the King it had slain, and the Commune was worse than Napoleon III. Was the Declaration of Independence of 1776 a mere phantasm of the founders of the Republic putting forth fantastic fictions? If so, the people of the United States ought, logically, to be now a Crown Colony of Great Britain, awaiting, like the Boers, the good pleasure of Parliament and the King for such measure of liberty and justice as their masters might be pleased to bestow upon them.

Differing from the condition of a State legislature, the powers of Congress are such, and such only, as the Constitution has imparted to it. It did not create the Constitution, but, on the contrary, the Constitution created it and endowed it with all, and the only, powers it possesses. "All legislative power herein granted shall be vested in a Congress of the United States, etc.," is the very first provision of the Constitution. These powers are then enumerated and distributed; and, to guard against misconstruction and usurpation, special prohibitions were established, and the whole mass of powers not so delegated were expressly "reserved to the States respectively, or to the people." No general sovereign power, such as is attributed to the ruler or people of a single and separate State, was conferred on Congress or the President. This is in distinct contrast with the powers of the legislatures of the several States, which are sovereign and supreme, except in so far as their own written Constitutions and the Constitution of the United States limit them.

The foregoing observations set forth briefly what has been, during the whole period of our national existence until now, considered to be axiomatic—the rock on which the edifice of just liberty and order should stand indestructible.

The first of the two cases referred to in the opening of this article is *De Lima versus Bidwell*. In this it was held that instantly upon the cession of Porto Rico by Spain to the United States, that Island became a part of the United States, and that duties could not be lawfully exacted upon merchandise coming thence to the United States after the cession and before the so-called Foraker Act was passed by Congress.

The second case referred to is *Downes versus Bidwell*. In this case it was held that Congress could constitutionally impose duties not uniform throughout the United States, and which were discriminative, upon merchandise coming from Porto Rico to the United States after the Foraker Act providing for such duties was passed, for the reason that Porto Rico is not a part of the United States within the meaning of the revenue clauses of the Constitution.

The decision in the first mentioned case was delivered by Mr. Justice Brown, and concurred in by the Chief Justice, and Justices Harlan, Brewer and Peckham, and dissented from by Justices Gray, Shiras, White and McKenna. The decision in the second case was also delivered by Mr. Justice Brown, and concurred in by Justices Gray, Shiras, White and McKenna, for reasons (as stated by Mr. Justice White) "different from, if not in conflict with, those expressed" in the opinion of Mr. Justice Brown; and it was dissented from by the Chief Justice, and Justices Harlan, Brewer and Peckham.

However variant in principle and deduction these two controlling decisions and the reasons announced therefor may be, and however grave the consequences that may flow from them, and especially from the latter one, in the future, they must now stand and must continue to stand unless they should be reviewed and one or the other of them overruled by the same great tribunal, whose judgments must command the respectful acquiescence of all good citizens (and particularly of the citizens of the respective States whose equality of burdens and of rights under the Constitution are still secure from Congressional injustice, so long as they stay at home and have nothing to do with the Territories), as determining what are the powers of Congress over the people of all the Territories of the United States, present and to come.

Thus, ceded territories become absolutely a part of the United

States, but their citizens are not entitled to *some* of the protections of the Constitution against unbridled power. Whether they are entitled to *any* constitutional protection, or are solely dependent on legislative will for the security of rights which the Constitution makes sacred to the people of the several States against invasion by Congress, remains to be determined. Among these rights named in the Constitution are:

The right to have representatives and direct taxes apportioned according to numbers;

The right to have all duties, imposts and excises uniform throughout the United States;

The right that no appropriation of money for the support of armies shall be for a longer term than two years;

The right that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it;

The right that no bill of attainder or *ex post facto* law shall be passed;

The right that no capitation or other direct tax shall be laid unless in proportion to census enumeration;

The right that no tax or duty shall be laid on articles exported from any State;

The right that no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another, nor that vessels bound to or from one State shall be obliged to enter, clear or pay duties in another;

The right that no person shall be convicted of treason unless on the testimony of two witnesses, and that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted;

The right to be free from laws respecting an establishment of religion;

The right to the free exercise of religion;

The right to freedom of speech and of the press;

The right peaceably to assemble, and to petition the Government for a redress of grievances;

The right to keep and bear arms;

The right to be free from the quartering of soldiers in their houses in time of peace, and in time of war only in a manner prescribed by law;

The right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures;

The right to be secure from certain criminal prosecutions unless on the indictment of a grand jury;

The right not to be subject for the same offence to be twice put in jeopardy;

The right not to be compelled in criminal cases to be witnesses against themselves;

The right in criminal cases to be informed of the nature and cause of accusation, and to be confronted with the witnesses against them, and to have compulsory process for obtaining witnesses in their favor, and to have the assistance of counsel;

The right to be free from cruel and unusual punishments.

This enumeration of rights comprises a large part of those understood by the framers of the Constitution, and by the people and States adopting it, to be among the fundamental and inalienable rights of man living in civilized and organized communities. At the time of the adoption of the Constitution and of the first body of amendments, the Government of the United States was in possession and control of the Territory northwest of the Ohio River, which it had acquired by cession from those States which had before claimed dominion over it. The same Constitution that declared and secured these rights declared that Congress should have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States. Can it be possible that this grant of power was not intended to be, and was not in fact and law, subject to these same limitations and prohibitions imposed upon Congress by language unrestrained and in no way limited to particular parts of the one country over which the Government had become supreme, and for the government of which the departments of the legislature, the executive and the judiciary were established? If the people residing in the several States so needed the securities above mentioned, notwithstanding the protection the governments of their respective States might give them, by so much the more would the people of the Territory then under the dominion of the United States need them. Can it be that as to them Congress was superior to the Constitution, and could deny to them the rights which, were they inhabitants of any of the States, Congress could not invade?

It is true that it has long been held that, in respect of the life tenure of judges mentioned in the Constitution, that tenure was not required in the Territorial courts; but it may be fairly contended from the judicial article of the Constitution that the autonomy of the judicial establishment therein described was to be exercised within the boundaries of the respective States, and that in the government of the Territories the official tenure of the judges of courts established therein, under the power to make all needful rules and regulations, need not be for life. But, however this may be, it can furnish little, if any, reason for expanding a mistaken construction of one clause of the Constitution to all the others.

Unequal taxation is, perhaps, the most galling and destructive of all forms of tyranny. If the uniformity of taxation clause of the Constitution had been omitted, and Congress should now impose a tax discriminating against the people of some State or group of States, what would be likely to happen? What ought to happen? Are the principles of justice and the necessity for constitutional protection against abuses of sovereign power in and by the same government superfluous and illogical beyond the physical boundary of the States? These and many other like questions force themselves into the pathway of what its devotees hoped to be our benevolent and Christian imperial progress, carrying with it liberty, civilization and true religion. If the written Constitution of our country is clearly not adequate to these ends, it is not the fault of the judiciary; the responsibility is elsewhere. The paradox of a sovereignty created and existing only by the Constitution, but to be exercised contrary to its provisions, may be found to be best suited to the needs of twentieth century civilization; but this is more than doubtful. Doubtless, it is highly convenient, as it always has been, to rulers having aggressive policies, good or bad, to carry on, that no barriers to their free exercise exist. Thus, the colonial charters before the Revolution were perverted, suspended or revoked, as the will of a weak and wicked king, or the passions of party, or selfish motives of trade, dictated; and, following such precedents, as is reported, the charter of Cape Colony has just been suspended. And thus Congress, thinking itself free from any constitutional constraint, has thought it fit to enact discriminative measures affecting intrinsic rights and interests of our citizens and the other

people of Porto Rico and Hawaii, and has imposed conditions upon the people of Cuba not hinted at in the solemn, public declaration made by Congress, when the great drama out of which have grown all our present embarrassments opened. And in the Philippines, a government is being instituted and laws decreed by the President alone, in his sole discretion, under an authority granted him by Congress for that purpose—and, in legal effect, a power to continue in him until he himself shall consent to surrender it, or two-thirds of each House shall take it from him. The theory and standards of a people's government must have greatly changed since the Congress of the Confederacy provided for the government of the North West Territory in 1787, when, having full sovereign power unlimited by any Constitution, it enacted a system of laws for that Territory and provided for their due and orderly execution; and since the Congress of the United States provided in 1803 for the government of the vast territory ceded to the United States by France, and enacted that the President should take possession of the territory, and "that, until the expiration of the present session of Congress, unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion." This Act provided for the administration of the then existing laws, as they had been administered by the officers of France, by officers to be appointed by the President—a mere change from French officers to American officers, and nothing more. The President was to regulate the manner of the exercise of the specified powers to the end of preserving liberty, property and religion; but he could neither increase, diminish nor change the powers themselves. He had no more power over them than the Secretary of the Treasury has over the revenue laws. His was executive power, pure and simple. And even that measure of authority was limited in time to the then session of Congress.

The Philippine Act of March 2d, 1901, provided that "all military, civil and judicial powers necessary to govern the Phil-

ippine Islands, acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property and religion." In the Louisiana instance, the military, civil and judicial powers existing at the time of the cession, and none others, were to be administered. In the Philippine instance, all military, civil and judicial powers necessary to govern the islands were to be administered. In the first case, existing laws were to be executed; in the second case, any and all laws thought necessary by the President were to be set up and executed. The contrast between the essential principles and the actual grants of power to the President in the two Acts could not be more complete. In Louisiana, Congress adopted the existing laws and merely changed the personnel of their administrators. In the Philippines, Congress adopted no law at all, but deposited all power in the agents of the President.

The expansions and dominations, now almost encircling the globe, entered upon by Congress have cost the people of the United States a very great expenditure of blood and treasure, and a severe shock to the ideas of liberty, self-government and equality which used to be thought fundamental, and which we professed (sincerely, it is to be hoped) when we declared war against Spain. But the present situation must be taken as it is. The *status quo ante bellum* cannot be restored, and should not be if it could. It is possible, if the wisdom of Congress shall so determine, to protect and guide the people of the "appurtenant" Territories in accordance with the letter and spirit of the Constitution, and to give the civilized parts of them a substantially independent self-government, and to deal with the uncivilized tribes (including the "Emperor of Sulu" and his wives, subjects and slaves) by treaties, etc., just as we have for a century constitutionally done with the Indian tribes in the States and Territories on this continent.

That patriot, statesman and great jurist, Chancellor Kent,

said upon the subject, in his Commentaries on the Constitution, that:

"Such a state of absolute sovereignty, on the one hand, and of absolute dependence, on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a very natural tendency, as all pro-consular governments have had, to abuse and oppression."

Most of these difficulties and dangers can be avoided if we place our relations with these distant and different peoples on the footing of friendly assistance and protection in self-government, instead of on that of an absolute dominion. Although the present spirit of the times, both in public and private operations, may be that "They should take who have power, and they should keep who can," there is no good ground for discouragement to those who hope for the increase and diffusion of happiness among men. The disorders of policies and ambitions, and the warfare of contending and selfish interests among nations and in the social world, will by and by give way before the ever-increasing intelligence of all peoples.

"The tumult of the times disconsolate
To inarticulate murmurs dies away,
While the eternal ages watch and wait."

While the liberty of speech, of education and of religion exists, the golden future will draw nearer and nearer, however much the present may be clouded.

GEORGE F. EDMUNDS.